RECORD
AND
BRIEFS

No. 10-1319

Supreme Court, U.S.
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In the Supreme Court of the United States

MARTIN JAKUBOWSKI,

Petitioner,

v.

THE CHRIST HOSPITAL, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Sixth Circuit correctly apply the good faith standard to the interactive process in determining that Petitioner failed to make a *prima facie* case for discrimination under the Americans With Disabilities Act (42 U.S.C. §12112(a))?

2. Did the Sixth Circuit depart from the majority rule requiring good faith participation in an interactive process in attempting to make a reasonable accommodation to an employee's disability?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent The Christ Hospital is an Ohio non-profit corporation that is exempt from federal income tax under Section 501(c)(3) and is a public charity under Section 509(a)(1) of the Internal Revenue Code; its immediate parent is The Christ Hospital, Inc., (incorrectly identified as Respondent in the caption) that is exempt from federal income tax under Section 501(c)(3) and is a public charity under Section 509(a)(3) of the Internal Revenue Code; and its parent is The Elizabeth Gamble Deaconess Home Association, that is also exempt from federal income tax under Section 501(c)(3) and is a public charity under Section 509(a)(3) of the Internal Revenue Code. There is no publicly-held company that owns 10% or more of its stock.

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STATEMENT OF THE CASE

Petitioner, Dr. Martin Jakubowski ("Jakubowski"), petitions for review of a Sixth Circuit decision affirming summary judgment in favor of Respondents, The Christ Hospital (incorrectly identified as The Christ Hospital, Inc. in the caption), and Dr. Phillip Diller (collectively "TCH"), finding no violation of the Americans with Disabilities Act, (ADA) 42 U.S.C. §12112(a). The pertinent facts, which are also set forth in the Sixth Circuit opinion and the district court order, are briefly recounted here.

In July and August 2007, Jakubowski was a resident in graduate medical education ("GME") at TCH. (Pet. App. 4). Jakubowski was notified that he was being terminated from the program at the end of August 2007, effective at the end of September. (Pet. App. 5). This was not the only GME program that Jakubowski failed. (Pet. App. 3, 25). Significantly, prior to beginning at TCH, Jakubowski failed a GME program in 2005 after being placed on a remediation program that included sending him to a psychologist for evaluation. (*Id.*). Jakubowski also did not successfully perform in a training course he participated in after failing the GME in 2005. (Pet. App. 3, 25-26).

After he was notified of his termination from the TCH program, Jakubowski first learned that he is autistic and has Aspergers' syndrome. (Pet. App. 5, 28). Jakubowski then asserted that it was his incurable Aspergers that caused his failures at TCH (and prior GME programs). Importantly, Jakubowski conceded, Aspergers prevents him from receiving, communicating, and interpreting information to/from

patients correctly. (Pet. App. 7). Further, Jakubowski asserted that his Aspergers causes him "mind blindness," and prevented him from developing "normal" communication skills which he characterizes are like a "magical sixth sense."

After being diagnosed with Aspergers and after being notified that he was being terminated from TCH's residency program, Jakubowski asked TCH to accommodate his Aspergers with "knowledge and understanding." (Pet. App. 6, 28). Specifically, Jakubowski requested that TCH educate its staff (physicians and nurses) on Aspergers (the "Requested Accommodation"), apparently with the objective of fostering their understanding of the disease in hopes that their interactions with him would improve. (*Id.*). However, Jakubowski neither proposed nor sought any accommodation for the obstacles his Aspergers posed with respect to his interactions with patients – obviously a most critical element for both patient safety and his ability to perform independently as a resident and ultimately as a family practice physician. Jakubowski simply proposed that he would work on that key matter of concern on his own.

While TCH never asserted that educating its staff would be "unreasonable," TCH informed Jakubowski that his request totally failed to address his inability to communicate accurately with patients and others. The Requested Accommodation, therefore, did not make Jakubowski satisfy the "otherwise qualified" showing required under the ADA.

During the ensuing interactive process, TCH shared its belief that Jakubowski's request had significant shortcomings, but, believing in good faith

that no reasonable accommodation existed, was unable to respond with a viable alternative at TCH that could deal with the critical patient safety issue. Consequently, TCH felt it could only offer to accommodate Jakubowski by assisting his placement into a residency program where the physician–patient relationship was not so crucial (i.e., pathology). (Pet. App. 6, 28-29). That conclusion was affirmed through an internal review process-that Jakubowski had requested-in December 2007.

Several years later (during the discovery phase of the litigation), Jakubowski finally recognized that the only conceivable "accommodation" for his impaired ability to receive, communicate, and synthesize information required that another medical doctor accompany him at all times and monitor all of his actions and communications. (Pet. App. 7). Putting aside the fact that this new accommodation was never actually requested, it is not "objectively reasonable," yet, absent that extraordinary accommodation, no avenue existed to safeguard patient care and protect against patient safety concerns, such as the inherent safety risk resulting from miscommunication between the patient and physician. (Pet. App. 9).

The district court agreed and granted summary judgment to TCH. (Pet. App. 24).[1] While the district court found that there was no genuine dispute in the record that Jakubowski suffered from a disability resulting from Aspergers, the court held specifically that Jakubowski's proposed accommodation of

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[1] Judge S. Arthur Spiegel presided as the District Court Judge in this matter.

"knowledge and understanding" on the part of TCH's staff did not adequately address the patient safety issue raised by TCH. (Pet. App. 42-43). The court further determined that TCH presented legitimate concerns that Jakubowski's condition represented unacceptable long-term risks regarding his successfully becoming a practicing family doctor, the type of medical work for which the TCH residency program was designed. (Pet. App. 43). Further, the court found that there was no genuine dispute as to whether TCH had entered into a good faith process of trying to accommodate Jakubowski and to assist him in finding a position as a physician in another residency program where he could be successful, such as in a pathology residency program. (Pet. App. 44). The court additionally found credible that TCH's uncontested expert evidence that Jakubowski's post-litigation requested accommodations were unduly burdensome. (*Id.*) As a result, "the Court [found that Jakubowski was] not 'otherwise qualified' as a matter of law and [held that TCH] did not deny [Jakubowski] a reasonable accommodation on account of his disability." (*Id.*)

The Sixth Circuit Court of Appeals affirmed,[2] finding that the accommodation of "knowledge and understanding" proposed by Jakubowski was not reasonable because it did not address how the accommodation "would improve his communication and interaction with patients, which are parts of the

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[2] Judge Boyce F. Martin, Jr. authored the majority opinion, Judge Eric L. Clay joined the majority and Judge R. Guy Cole, Jr. authored his own concurrence but joined in the majority affirming the District Court.

essential function of a family practice resident." (Pet. App. 15). Accordingly, the Sixth Circuit concluded that Jakubowski had failed to meet his burden that he is an otherwise qualified individual under the ADA. (*Id.*). The Sixth Circuit also concluded that TCH had acted in good faith when participating in the interactive process. (Pet. App. 17). Specifically, the Sixth Circuit found that TCH acted in good faith when it "met with Jakubowski, considered his proposed accommodations, informed him why they were unreasonable, offered assistance in finding a new pathology residency, and never hindered the process along the way." (*Id.*)

Jakubowski's motion for reconsideration and consideration *en banc* was denied. (Pet. App. 48).

REASONS FOR DENYING THE PETITION

A principal use of certiorari jurisdiction is to resolve conflicts among Circuit Courts of Appeals concerning the meaning of federal law. *Braxton v. United States*, 500 U.S. 344, 347 (1991). "A writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. The petition fails to meet the high standard for review.

Jakubowski advances two faulty premises. The first is that this case implicates a conflict in the circuits regarding whether an employer must engage affirmatively in a good faith effort in the interactive process and to what extent the employer must go to meet a "good faith effort" standard. The second is that the ADA requires an employer to make a counter-proposal of a reasonable accommodation even where the employer believed in good faith that none existed.

Neither contention merits review because, not only is there no significant split it the circuits regarding a good faith accommodation, the impact on this case would be no different even if this court decided not to require that the employer engage in the interactive process in good faith.

A. No Conflict Has Been Created By The Sixth Circuit Finding That Jakubowski Failed To Establish A Prima Facie ADA Discrimination Case Where The Sixth Circuit Applied A Good Faith Standard To The Interactive Process.

1. There is no significant split in the circuits regarding the good faith standard applied to employers during the interactive process.

According to Jakubowski, there is a split in the circuits regarding the law and/or understanding of interactive process requiring resolution by this Court. Jakubowski asserts that the Third, Fifth, and Seventh Circuits require an employer to act in good faith during the interactive process and to participate in the search for a position. Pet. 14-16. He further contends that the Ninth, Tenth, and Eleventh Circuits do not require an employer to engage in the interactive process in good faith. Pet. 16. Jakubowski then erroneously suggests that the Sixth Circuit aligns the requirements of an employer with those of the Ninth, Tenth, and Eleventh Circuits. Jakubowski's characterization of the purported broad split in the circuits is inaccurate and based on outdated case law.

Upon examination, only the Eleventh Circuit currently holds that an employer has no obligation to

engage in the interactive process at all. *Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir. 1997) (an employer cannot be held liable merely for not engaging in the interactive process). The Ninth Circuit case relied upon in Jakubowski's brief, was overruled by *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1114-5 (9th Cir. 2000)*(en banc)*, vacated on other grounds, *U.S. Airways v. Barnett*, 535 U.S. 391, 122 S.Ct. 1516 (2002). The Tenth Circuit has also added the good faith requirement. *See Lowe v. Indep. Sch. Dist. No. 1 of Logan Cnty.*, 363 Fed. Appx. 548, 553 (10th Cir. 2010); *Smith v. Midland Brake*, 180 F.3d 1154, 1172 (10th Cir. 1999)("the interactive process includes good faith communications between the employer and the employee").

Except for the Eleventh Circuit, all of the circuits, including the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits, require that the employer act in good faith where an accommodation is identified by the employee, which ordinarily requires engaging in an interactive process with the employee where reasonable accommodation is possible. *See e.g., Enica v. Principi*, 544 F.3d 328, 339 (1st Cir. 2008)("the issue of good faith is relevant in examining the interactive process."); *McBride v. Bic Consumer Prods. Mfg. Co.*, 583 F.3d 92, 100 (2d Cir. 2009)(employer required to engage in an interactive process where employee can establish, with the aid of some identified accommodation, that she was qualified for the position); *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 315 (3rd Cir. 1999)(requiring that employer make a good faith effort in the interactive process); *Haneke v. Mid-Atl. Capital Mgmt.* 131 Fed. Appx. 399, 400 (4th Cir. 2005)("Implicit in the 4th element [of failure to accommodate] is the ADA requirement that

the employer and employee engage in an interactive process to identify a reasonable accommodation. We find that there is a disputed issue of material fact as to whether both parties met their respective burdens of engaging in the interactive process in good faith")(internal citation omitted); *Equal Emp't Opportunity Comm'n v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 621 (5th Cir. 2009)(citing a Sixth Circuit case, *Kleiber v. Honda of Am. Mfg.*, for the proposition that the interactive process requires "'communication and good-faith exploration.'"); *Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862 (6th Cir. 2007)(employer must engage in a good faith interactive process); *Equal Emp't Opportunity Comm'n v. Sears, Roebuck & Co.*, 417 F.3d 789, 805 (7th Cir. 2005)(finding that parties must participate in the interactive process in good faith); *Peyton v. Fred's Stores of Arkansas*, 561 F.3d 900, 902 (8th Cir. 2009)(employer must make a good faith effort in assisting with reasonable accommodations); *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002)("[t]he interactive process requires: (1) direct communication between the employer and employee to explore in good faith the possible accommodations"); *Lowe v. Indep. Sch. Dist. No. 1 of Logan Cnty.*, 363 Fed. Appx. 548, 552 (10th Cir. 2010)("the interactive process is typically an essential component of the process by which a reasonable accommodation can be determined and includes good-faith communications between the employer and the employee. Neither party may create or destroy liability by causing a breakdown of the interactive process. A question of fact as to whether an employer has failed to interact in good faith and thus failed to reasonably accommodate will preclude summary judgment.")(citing *Albert v. Smith's Food & Drug Ctrs., Inc.*, 356 F.3d 1242, 1249 (10th Cir. 2004)).

Thus, not only is there no split in the circuits (except for the Eleventh), the Sixth Circuit, contrary to Jakubowski's argument in his petition, does require good faith participation in an interactive process where accommodation is reasonably possible.

Moreover, prior to this case, the Sixth Circuit has consistently held that an employer has a duty in ADA cases to engage in the interactive process in good faith. *Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862 (6th Cir. 2007). The Sixth Circuit has even pronounced that "the purpose of this process is to identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." *Id.* (citing 29 C.F.R. §1630.2(o)(3)). Thus, by enforcing the "added requirement" of good faith, there can be no question that the Sixth Circuit is fully in line with ten of the eleven circuits on this issue.

Even if this Court were to accept jurisdiction in this case merely because the Eleventh Circuit does not apply the good faith requirement, the result of the case would of course be no different because the Sixth Circuit here applied the highest standard of good faith and yet decided that Jakubowski presented no claim under the ADA. (Pet. App. 16). Accordingly, there is no reason to accept an appeal on these facts because the actual decision of the Sixth Circuit would necessarily be affirmed even if the position of the Eleventh Circuit were to be adopted.

2. Sixth Circuit appropriately applied an appropriate "good faith" standard.

Jakubowski also argues that the Sixth Circuit's decision is in conflict with *Taylor v. Phoenixville Sch. Dist.*, 174 F.3d 142 (3rd Cir. 1999) ("Taylor I"), opinion vacated by *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296 (3rd Cir. 1999) ("Taylor II"), and *Bultemeyer v. Ft. Wayne Cmty. Sch.*, 100 F.3d 1281, 1285 (7th Cir. 1996). Pet. 17-18. Jakubowski points to these decisions as supporting his position that an employer must actually go further than required by the Sixth Circuit to meet the "good faith" standard. Once again, Jakubowski misapplies the case law to these facts and seems to be trying merely to split hairs to find an issue where none exists.

In Taylor II, the Third Circuit determined that the "interactive process would have little meaning if it was interpreted to allow employers, in the face of a request for accommodation, simply to sit back passively, offer nothing and then, in post-termination litigation, try to knock down every specific accommodation as too burdensome." *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d at 315. Importantly, the facts in this case show that TCH did not passively sit back; rather, the undisputed evidence demonstrates that TCH meaningfully participated in good faith by meeting with Jakubowski, considering his proposed accommodations, informing him why they were unreasonable, offering assistance in finding a new residency, and hindering the process in no way. Pet. App. 17. TCH made repeated attempts and offers to help Jakubowski both during the program and after he left the program. Thus, even under the Third District's interactive process standards, the result

would be no different because TCH, on the undisputed evidence, met that standard.

In *Bultemeyer*, the Seventh Circuit concluded that an "employer has to meet the employee half-way, and if it appears that the employee may need an accommodation but doesn't know how to ask for it, the employer should do what it can to help." *Bultemeyer v. Ft. Wayne Cmty. Sch.*, 100 F.3d at 1285. There is no compelling reason to take the instant case because, once again, the Sixth Circuit found that TCH had satisfied even this standard. The record indicates that Jakubowski knew how to – and did – ask for an accommodation of knowledge and understanding. And, not only did TCH explain why Jakubowski's proposed accommodation completely failed to address the patient safety and care issues, it proposed the only kind of accommodation it reasonably could envision, given Jakubowski's inability to interact with patients independently, and that was to help place him in an alternative residency program where patient interaction was not required.

Simply, there is no split in the circuits regarding the level of good faith required by employers; rather, as shown by the foregoing, the question of good faith is dependent on the facts presented in each case, and here the Sixth Circuit found that the evidence before it conclusively established good faith participation in the interactive process by TCH.

B. The Sixth Circuit Did Not Depart From Established Case Law Relating To Reasonably Accommodating Jakubowski.

Jakubowski argues that the Sixth Circuit departed from the requirements of the ADA by considering an employer's offer to help an employee obtain a position with another employer for determining whether the employer acted in good faith in the interactive process. Pet. 18-20. Jakubowski states that "[l]iterally, for the first time since the enactment of Title I of the Americans with Disabilities Act, a Federal Circuit Court has concluded that an employer discharges their obligation to reasonably accommodate an otherwise qualified individual by conditionally offering to assist them to find a job with another employer." Pet. 18-19. That was not the Sixth Circuit's holding in this case.

To repeat, the Sixth Circuit has consistently held that an employer does have a duty of good faith when engaging in the interactive process. *Kleiber v. Honda of America Mfg., Inc.*, *supra*. This duty does not necessarily require its making a counter-proposal; rather an employee has the burden of proposing an initial accommodation, and the employer has the burden of showing how the accommodation would cause an undue hardship, but the employer is not required to propose a counter accommodation in order to participate in interactive process in good faith. *Talley v. Family Dollar Stores of Ohio, Inc.*, 542 F.3d 1099 (6th Cir. 2008). The court has noted, however, that taking the additional step of making a counter-proposal may be considered as evidence of good faith. *Kleiber*, *supra*, 485 F.3d at 872. But, of course, such a requirement would not be workable for those cases where there simply was no possible reasonable

accommodation. *Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 952 (8th Cir. 1999)("an employer will not be held liable under the ADA for failing to engage in an interactive process if no reasonable accommodation was possible").

In this case, the Sixth Circuit held that TCH engaged in the interactive process by meeting with Jakubowski, considering his accommodations and informing him why they were unreasonable. The Sixth Circuit also found on the undisputed facts that TCH went further than required and offered to help place him in an alternative residency program where it believed he could be successful (i.e., a pathology residency).

The simple fact that the evidence, without genuine dispute, shows that Jakubowski cannot practice as a family medicine resident without posing an unreasonable risk to patients, means that he is entitled to no relief under the ADA. In other words, there is no evidence upon which any reasonable jury could find that there existed some reasonable accommodation that would have enabled Jakubowski to perform the essential functions required of a family practice resident at TCH. Taking the analysis one step further, even assuming the "accommodation" of assigning to him a shadow physician would mitigate the issue of patient risk (a point not conceded by TCH), the uncontested evidence is also that such accommodations would constitute an undue burden on TCH. The Supreme Court found that an educational institution (such as TCH) has no obligation to make a substantial modification to standards to accommodate the disabled. *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 414 (1979). *See also Howard v. City of*

Beavercreek, 276 F.3d 802, 806 (6th Cir. 2002)(citing *Smith & Lee Assoc., Inc. v. City of Taylor, MI*, 102 F.3d 781, 795 (6th Cir. 1976)(an accommodation is not reasonable if it contemplates a "fundamental alteration in the nature of a program" or "undue financial and administrative burdens")). Thus, not only did TCH as a matter of fact engage in the interactive process in good faith, it offered the only accommodation reasonable under the circumstances.

In sum, the Sixth Circuit correctly decided this case on its merits and its judgment affirming the district court's summary judgment order should not be disturbed.

CONCLUSION

For all of the reasons discussed in this brief, this petition for writ of certiorari should be denied.

Respectfully submitted,

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